In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the District Court (App. 40-55) is reported at 384 F. Supp. 765. The opinion of the Sixth Circuit Court of Appeals (App. 103-110) is reported at 522 F.2d 850.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an employer's disparate treatment of pregnant employees and those suffering from sickness or injury with regard to sick leave payments constitutes unlawful discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

2. Whether an employer's disparate treatment of pregnant employees and those suffering from sickness or injury with regard to retention of accumulated seniority constitutes unlawful discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1), provide as follows:

> "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

STATEMENT OF THE CASE

Respondent, Mrs. Satty, was hired by Petitioner, Nashville Gas Company (herein referred to as the "Company"), as a junior clerk in the customer accounting department on March 24, 1969. She was promoted to clerk on December 2, 1969, the position she held when she was placed on pregnancy leave on December 29, 1972. While she was pregnant, the Company's Vice President of Personnel discussed with her and two other pregnant employees the Company's policy with respect to pregnancy leaves. He stated that any decision as to when pregnancy leave should commence would be based on her doctor's opinion, her duties with the Company, her work area and the degree of public contact, but that he was to have the final decision as to when the leave would commence. Friday, December 22 and Monday, December 25 were company holidays. Mrs. Satty failed to report for work on Tuesday, December 26, Wednesday, December 27, Thursday, December 28 and Friday, December 29, 1972. She was having problems with water retention during such time as a result of her pregnancy. The Company's Vice President of Personnel requested that she request pregnancy leave and pregnancy leave was granted commencing December 29, 1972. Her child was born on January 23, 1973, 25 days after maternity leave commenced (App. 29-30).

The Company does not have a disability plan as such for its employees but does provide a sick leave plan under which it pays employees absent from work due to non-occupational sickness or injury for a specified number of days based on the employee's seniority (App. 96-98). At such time as the employee is able to resume work, he or

she is generally returned to the job previously held if his or her physical condition permits although the Company does not feel that it is obligated to hold jobs open for an employee who is absent for extended periods of time due to nonoccupational sickness or injury (App. 17). Moreover, an employee who returns to work after being on sick leave retains the seniority which he or she has accrued prior to the sickness or injury (App. 18).

Pregnancy is not treated as a sickness or injury under the Company's sick leave plan. Rather a pregnant employee is granted a formal leave of absence by the Company similar to that which is granted to employees, male and female, to pursue additional education or after sick leave has been exhausted. An employee who is placed on formal leave of absence, including pregnancy leave, is paid for accumulated vacation time but does not receive sick leave payments. An employee who has been on formal leave of absence and who desires to return to work is permitted to return to work when a permanent position for which he or she is qualified becomes available and when no employee then permanently employed is bidding on the opening. An employee who has been on a formal leave of absence, including pregnancy leave, and who wants to return to work does not retain previously accumulated seniority for the purpose of bidding on permanent job openings, although he or she is given priority over nonemployees. Upon returning to work such employee does retain previously accumulated seniority for purposes of pensions, vacations and other benefits. During the interim between the time such an employee seeks to return to permanent employment and the time that the employee is re-employed on a permanent basis, the Company attempts to provide the employee with temporary work (App. 17-18, 30-31).

At the time Mrs. Satty was placed on pregnancy leave, the Company was contemplating converting certain of its accounting functions performed in her department to computers and consequently it was determined that Mrs. Satty's position would not be filled. The Company did, however, provide Mrs. Satty temporary work approximately six weeks after her child was born. The temporary employment ended approximately one month later when the job was completed. Thereafter, in order to collect unemployment compensation insurance, Mrs. Satty requested the Company to change her employment status from pregnancy leave to termination, which the Company did (App. 31). During the period between the time Mrs. Satty's child was born and the time she was terminated, she applied for three full-time positions which became available with the Company; however, in each case a permanent female employee with seniority was awarded the position. Had Mrs. Satty retained her job-bidding seniority, she would have been awarded the positions instead of the other females (App. 33).

Between December 29, 1972 (the date Mrs. Satty's pregnancy leave commenced) and July 1, 1974, five employees of the Company were placed on pregnancy leave and two of such employees returned to work as permanent employees. In addition to the three employees who did not return to work as permanent employees, three other permanent clerical employees of the Company resigned between December 1972 and September 1974 when this case came to trial. However, the only new permanent clerical employee or PBX operator (positions of the type for which Mrs. Satty applied) hired by the Company after December 1972, was hired on May 6, 1974 (App. 33-34).

Subsequent to her termination by the Company, Mrs. Satty filed a timely charge of sex discrimination under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission (EEOC). After receiving her "right to sue" letter, she brought an action against the Company in the United States District Court for the Middle District of Tennessee in which the following specific aspects of the Company's employment practices were at issue (App. 35):

1. Payment of pregnancy benefits under the Company's group health and hospitalization insurance plan different from benefits provided under such plan for sickness and accident.

2. The denial of sick leave pay to Mrs. Satty while she was on pregnancy leave.

3. The action of the Company in requiring Mrs. Satty to commence maternity leave on December 29, 1972.

4. The failure of the Company to hold Mrs. Satty's job open for her while she was on maternity leave.

5. The failure of the Company to permit Mrs. Satty to retain her previously accumulated seniority for purposes of bidding on job openings.

Mrs. Satty also alleged that she was terminated by the Company in violation of 42 U.S.C. §2000e-3(a) for complaining about its pregnancy leave policies.

She prayed for reimbursement, back pay, reimbursement for lost sick pay and other fringe benefits, and attorneys' fees (App. 7-8).

Although Mrs. Satty originally sought to maintain this action as a class action, the parties subsequently stipulated

that the number of persons whom she could properly represent was not so numerous that the action could be maintained as a class action under Rule 23, Federal Rules of Civil Procedure (App. 33).

The District Court held that the Company violated Title VII by denying sick leave pay to Mrs. Satty while she was on pregnancy leave since it granted sick leave pay to employees absent due to illness or other non-work related disabilities (App. 45). The District Court also held that although the Company was justified in not holding her job open for her while she was on pregnancy leave (App. 52), its policy of not permitting her to retain her previously accumulated seniority for job-bidding purposes was unlawful discrimination since it permitted employees returning from long periods of absence due to non-job related injuries to retain their seniority (App. 44).

The District Court rejected Mrs. Satty's contentions that payment of pregnancy benefits under the Company's group health and hospitalization plan was discriminatory, that her being placed on pregnancy leave on December 29, 1972 was unreasonable or arbitrary, and that her subsequent termination was retaliatory (App. 43, 52, 54).

Based on stipulations filed by the parties in response to the District Court's opinion, the Court finally ordered (App. 57-58) that Mrs. Satty:

1) recover sick leave benefits that should have been paid during her pregnancy leave in the amount of $732.16;

2) be credited with sick leave benefits from March 14, 1973, the time she returned from maternity leave;

3) be reinstated as a permanent employee as of April 2, 1973, the date that the first permanent position af-

ter March 14, 1973 was filled with another employee whose initial date of hire was later than Mrs. Satty's;

4) recover back pay in the amount of $9,456.21, being back wages from April 2, 1973 reduced by amounts paid for temporary work with the Company, unemployment compensations, and wages from other employment; and

5) recover attorneys' fees in the amount of $3,000.00.

All of such relief was stayed pending appeal.

The Sixth Circuit Court of Appeals affirmed the judgment of the District Court and held that the exclusion of normal pregnancy from a sick leave program and the denial of seniority constituted sex discrimination under Title VII (App. 103-105). The Court of Appeals found this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), inapplicable to the case at hand, reasoning that the question of whether the exclusion by a private employer of pregnancy-related disabilities from its sick leave and seniority policies is a violation of Title VII is essentially a dissimilar question from the issue in *Geduldig*, i.e., whether a legislative classification dividing disability into two classes for the purposes of a state-supported disability income protection plan violates the Equal Protection Clause of the Fourteenth Amendment (App. 105-108). The Court of Appeals also relied heavily on the current EEOC regulations pertaining to pregnancy-related benefits and deferred to the Commission's construction of Title VII (App. 108-110).

Thereafter, on October 7, 1975, Petitioner, Nashville Gas Company, filed a Petition for a Writ of Certiorari to review the judgment of the Court of Appeals. The Petition was granted on January 25, 1977.

SUMMARY OF ARGUMENT

This case is controlled by *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (December 7, 1976), which was decided by this Court after the opinion of the Sixth Circuit Court of Appeals was rendered in this case. In *Gilbert*, this Court held that a private employer could, without violating Title VII of the Civil Rights Act of 1964, exclude pregnancy-related disabilities from coverage under its disability benefits plan absent a showing that such a distinction involving pregnancy was a mere pretext designed to effect an invidious discrimination against the members of one sex or the other. The only employment policies being challenged on appeal in this case are (1) the Company's denial of sick leave benefits to employees on pregnancy leave, and (2) the Company's refusal to credit employees on leaves of absence, including pregnancy leave, with accumulated seniority for job-bidding purposes.

Like the exclusion of pregnancy from coverage under a disability benefits plan, the employment policies at issue in this case do not discriminate on the basis of sex but merely exclude pregnancy coverage from the particular benefit and in all other respects treat women and men equally. Further, there has been no attempt to show that such policies are a mere pretext designed to effect an invidious discrimination against the members of one sex or the other nor has there been any showing that the effect of the Company's sick leave or seniority policies is to discriminate against the members of one sex or another.

The Company has elected to treat pregnancy leave the same as it would any leave of absence and not as a sickness or nonoccupational accident or injury. There is

no rational basis for distinguishing sick leave payments from payments under a disability benefits plan, and this Court has recently recognized this principle when it vacated the judgment of the Ninth Circuit Court of Appeals in *Lake Oswego School District No. 7, et al.* v. *Hutchison*, 519 F.2d 961 (9th Cir. 1975), and remanded the case for proceedings in accordance with *Gilbert*. 45 U.S.L.W. 3462 (No. 75-568, January 10, 1977).

The policy of the Company in refusing to credit those persons on leave of absence, including pregnancy leave, with accumulated seniority for job-bidding purposes does not in itself constitute gender-based discrimination, for there is no risk from which one sex is protected and the other not, nor is there a benefit which one sex receives and which is denied the other sex. The Company established a seniority policy which favored those employees who were actively working for the Company at the time a job opening became available to the detriment of those employees on leave of absence, including pregnancy leave. The benefits of this policy accrue to all continuously employed persons, male and female alike. Furthermore, there is no showing that a denial of seniority for job-bidding purposes is a mere pretext designed to effect invidious discrimination against the members of one sex or the other.

ARGUMENT

I. This Case Is Controlled by the Supreme Court's Holding in General Electric Company v. Gilbert That an Employer's Failure to Cover Pregnancy Related Disabilities Under Its Disability Benefits Plan Does Not Constitute, Per Se, Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964.

In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court held that the exclusion of disability attributable to normal pregnancy from coverage under a state disability insurance system was not invidious discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. In so holding, this Court stated:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such

as this on any reasonable basis, just as with respect to any other physical condition.

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 496, n. 20.

On December 7, 1976, this Court rendered its decision in *General Electric Company* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401, which involved the question of whether a private employer's disability benefits plan which excludes pregnancy related disabilities from coverage constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. This Court held that the exclusion of pregnancy from an otherwise comprehensive nonoccupational sickness and accident disability plan is not gender-based discrimination absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.

The *Gilbert* case involved an employer's disability insurance plan which excluded pregnancy from its coverage but otherwise covered all nonoccupational sicknesses and accidents. In the present case, the following employment practices not present in *Gilbert* were challenged under Title VII:

1) The allegedly arbitrary action of the Company in requiring Mrs. Satty to commence pregnancy leave on the date it did.

2) Payments under the Company's group health and hospitalization plan were allegedly not as generous for pregnancy as they were for other conditions.

3) The failure of the Company to make sick leave payments to Mrs. Satty while she was on pregnancy leave.

4) The failure of Company to hold Mrs. Satty's job open for her while she was on pregnancy leave.

5) The refusal of the Company to credit Mrs. Satty with previously accumulated job seniority for job-bidding purposes when she was able to return to work.

The District Court in this case held that the action of the Company in requiring Mrs. Satty to commence maternity leave on December 29, 1972 was not arbitrary or irrational and did not constitute discrimination (App. 52-53), that the Company was not required to hold her job open for her while she was on leave (App. 52) and that the group health insurance plan which paid 50% of the customary and reasonable fees incurred in connection with pregnancy to female employees or to wives of male employees did not constitute sex discrimination (App. 43). Mrs. Satty did not appeal the determination of the District Court as to these matters and, therefore, these questions are not in issue on this appeal.

The District Court did determine that the Company's policy of denying sick leave pay to pregnant employees on pregnancy leave and its policy of not allowing an employee on pregnancy leave to retain her previously accumulated seniority for purposes of bidding on permanent job openings constituted unlawful sex discrimination. These are the two aspects of the Company's employment policies which are at issue.

In *Gilbert*, this Court noted that Congress had not defined the term "discrimination" anywhere in Title VII but that the similarities between the Congressional language in Title VII and the concepts of discrimination which have evolved from Court decisions construing the Equal Protection Clause of the Fourteenth Amendment indicate that these decisions are a useful starting point in interpreting discrimination under Title VII. This Court stated that its decision in *Geduldig* v. *Aiello, supra,* was certainly relevant in determining whether or not the pregnancy exclusion discriminated on the basis of sex. This Court held that the exclusion of pregnancy from coverage was simply not in itself discrimination based on sex.

It rationally follows from this finding that any personnel policy which excludes pregnancy from coverage but in all other respects treats women and men equal is not in itself discrimination based on sex.

The applicability of this rationale is well illustrated in *Rafford* v. *Randall Eastern Ambulance Service,* 348 F. Supp. 316 (S.D.Fla. 1972), a Title VII case. In *Rafford,* male employees alleged that they were discharged for refusing to remove their beards and mustaches. The Court there held that such refusal was, in fact, the reason for their dismissal, but held that such action was not sex-based discrimination within the scope of Title VII. In addressing the argument of the plaintiffs, the Court said:

> "Plaintiffs in effect argue that males who do not shave cannot work, while females who do not and need not shave are allowed to work. Such an argument has a reductio ad absurdum appeal: since women cannot normally grow beards and mustaches, the firing of men with such features necessarily discriminates against the men because they are men and

> are able to grow beards, i.e., because of their sex. I cannot, however, subscribe to such an interpretation of the Act." 348 F. Supp. at 319.

Having rejected the simplistic concept that any practice based on a sex-related physical characteristic constitutes prima facie sex discrimination in violation of Title VII, the Court articulated the appropriate standard for determining what constitutes such discrimination under Title VII:

> "Virtually all Title VII violations fit an equal protection definition of sex discrimination—dissimilar treatment for similarly situated men and women, where the treatment is based on sex. *Reed* v. *Reed,* 404 U.S. 71 (1971). See, e.g., *Bowe* v. *Colgate Palmolive Company,* 416 F.2d 711 (7th Cir. 1969); *Weeks* v. *Southern Bell Tel. Co.,* 408 F.2d 228 (5th Cir. 1969) (weightlifting requirements); *Sprogis* v. *United Airlines, Inc.,* 444 F.2d 1194 (7th Cir. 1971); *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971). Here, however, the Court is presented with a case where there can be no similarly situated members of the opposite sex. An analogy, for which there is some precedent, posits the discharge of a pregnant woman . . . The discharge of a pregnant woman or bearded man does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored. These cases are perhaps more properly considered under the rubric of *Cooper* v. *Delta Airlines, Inc.,* 274 F. Supp. 781 (E.D.La. 1967), that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of discriminatio

in favor of men who shave off their beards and mustaches. It does not involve proscribed sex discrimination." 348 F. Supp. at 319-20.

Geduldig clearly indicates that the mere fact that an employment policy takes cognizance of a sex-related characteristic does not by itself make it sex discrimination in violation of Title VII. There must also be an element of favoritism toward similarly situated persons of the opposite sex; and that favoritism cannot exist where no member of the opposite sex can be so similarly situated.

This Court in *Geduldig* and *Gilbert* specifically recognized that, absent a showing of pretext, a case of sex discrimination is not established by proof that an employer's personnel policies treat pregnant women differently from women and men who have disabilities due to other causes. The Court recognized in *Geduldig* and *Gilbert* that a finding that there was not sex-based discrimination as such was not the end of the analysis, should it be shown that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. This Court noted that in neither case was there a showing that the exclusion of pregnancy benefits was a pretext. The Court in *Gilbert* stated:

> "As we noted in that opinion, a distinction which on its face is not sex-related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination. But we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is of course confined to women, but it is in other ways significantly

> different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and is often a voluntarily desired condition. 375 F. Supp. at 375, 377. We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discrimination against women." 45 U.S.L.W. 4034.

There has been absolutely no showing in this case that the treatment afforded pregnant female employees under the personnel policies in question was motivated by any intent to discriminate against female employees nor can such an inference be drawn.

This Court did acknowledge in *Gilbert* that a Title VII violation could be established under certain circumstances upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. However, in the present case, there has been no proof of any such discriminatory effect and, as recognized by this Court in *Gilbert*, the burden of proving such effect is on the plaintiff.

> "Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)." 45 U.S.L.W. 4034, n. 14.

In the present case both the District Court and the Court of Appeals held that the rationale of the *Geduldig* case was not applicable (App. 45, 107). In addition the Court of Appeals, in finding unlawful sex discrimination, relied heavily (App. 108) on the guidelines of the Equal Employment Opportunity Commission promulgated in 1972

which stated that disabilities caused or contributed to by pregnancy and related conditions should be treated on the same terms and conditions as are other temporary disabilities, 29 C.F.R. §1604.9(b) and §1604.10(b).

In *Gilbert*, this Court explicitly rejected the concept that the reasoning of *Geduldig* was not applicable to an action under Title VII. Furthermore, this Court, in *Gilbert*, specifically rejected the EEOC guideline for the reasons that it was not a contemporaneous interpretation of Title VII since it was first promulgated eight years after the enactment of that Title and that the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute. This Court stated:

> "We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. *United Housing Foundation* v. *Forman*, 421 U.S. 837, 858-9, n. 25 (1975); *Espionosa* v. *Farah Manufacturing Co.*, . . . 414 U.S. at 92-96. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore* [323 U.S. 130 (1955)]." 45 U.S.L.W. 4036.

That the opinion of the Court of Appeals in this case has no continuing validity after the decision of this Court in *Gilbert* was explicitly recognized by Mr. Justice Brennan in his dissent in that case. 45 U.S.L.W. 4037.

Not only is there no basis in the opinion in the *Gilbert* case for distinguishing the present case, but as Petitioner will hereafter show, the employment policies at issue in this case fit squarely within the rationale of the *Gilbert* case.

II. Petitioner's Denial of Sick Leave Benefits to Respondent While She Was on Pregnancy Leave Does Not Constitute Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964.

Both this case and the *Gilbert* case involve the employer's policy for providing periodic payments to employees who are absent from work as a result of a non-job related sickness or accident. In the *Gilbert* case, the plan is referred to as a disability plan and is administered for the employer by an insurance company (although the employer is for all practical purposes a self-insurer). In the present case, the policy plan is referred to as sick leave. In both cases the payments under the disability plan are based on an employee's regular weekly earnings. In the *Gilbert* case, payments continued (after a specified waiting period) up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related causes. In the present case, the period of time for which payments are made in a twelve-month period depend on the employee's length of service with the Petitioner and the extent to which the employee has previously been on sick leave (App. 96-98). Neither plan provides any payments in the event of absence due to pregnancy.

Notwithstanding the different names applied to the two policies and the slightly different methods for determining benefits, the two policies are essentially the same and there is no rational basis for distinguishing the two plans under the opinion of this Court in the *Gilbert* case.

This Court stated in *Gilbert*:

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect

in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.[17] For all that appears, pregnancy related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed inclusion of risk. To hold otherwise would endanger the common sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risk impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other." 45 U.S.L.W. 4035.

This Court went on to state in footnote 17 to the *Gilbert* opinion:

> "Absent proof of different values, the cost to 'insure' against the risk is, in essence, nothing more than extra compensation to the employees in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance', there would clearly be no gender based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondent seemed to acknowledge that the failure to provide any benefit at all would not constitute sex-based discrimination in violation of Title VII, see note 18, infra, they illogically also suggest that the present scheme does violate Title VII because. . . ." 45 U.S.L.W. 4035, n. 17.

The rationale set forth above applies with equal force to Petitioner's sick leave plan. The cost to Petitioner of its sick leave plan is the amount it pays employees who are absent from work due to sickness or injury.

Common sense dictates that the payment for sick days in circumstances not previously paid for by the Petitioner would cost the Petitioner additional money. Any increase in the number of sick days used would certainly increase the cost to the Petitioner. To hold that pregnancy related disabilities must be included under the sick leave policy would obviously increase the number of disabilities for which sick days would be paid under the plan since they have not heretofore been included.

The only way cost could remain the same between a paid sick day plan covering pregnancy and one which did not cover pregnancy would be to reduce the amount of sick days or the amount of the daily benefit under the policy to reflect additional days used under the policy for pregnancy. Such a reduction of benefits to maintain a constant cost to the employer would mean that pregnant women would receive a benefit at the expense of those male and female employees who are disabled for reasons unrelated to pregnancy. Title VII does not require an employer to reduce benefits to non-pregnant persons in order to benefit pregnant persons.

Furthermore, this Court has held that employers have no obligation under Title VII to pay additional benefits to pregnant employees. *Gilbert, supra,* 97 S.Ct. at 409, 410, n. 17. However, even if the amount of daily benefit

is not reduced, the inclusion of pregnancy under the sick leave plan would create an additional benefit for pregnant women in the amount of days used for pregnancy that would not have been otherwise used.

Under *Gilbert*, if the Petitioner increased each employee's wages by the average amount of cost incurred under the paid sick days plan, excluding pregnancy, and removed the paid sick days fringe benefit, there would be no violation of Title VII. This would be true even though a female employee who wished to purchase sick leave coverage for all disabilities, including pregnancy, would have to pay more than employees (both male and female) not wishing pregnancy coverage but merely paid sick leave coverage with the same daily benefits, due to the fact that the female's premiums would reflect the extra cost of pregnancy. As in *Gilbert*, the ultimate result here would be that a woman who wished to be fully insured would have to pay any incremental amount over other employees due solely to the possibility of pregnancy related disabilities. Like the employer in *Gilbert*, Petitioner has no obligation under Title VII to pay that incremental amount.

As in *Gilbert*, there is absolutely no showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of the female sex. There is absolutely no evidence in the record that the selection of the risks covered by the Petitioner's sick leave policies work to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the policy. There is absolutely no risk from which men are protected and women are not. Likewise, there is absolutely no risk from which women are protected and men are not. Respondent made no effort to make such a showing,

and it is submitted that Respondent could not. Respondent, as in *Gilbert*, has not attempted to meet the burden of demonstrating a gender-based discriminatory effect resulting from the exclusion of pregnancy related disabilities. Since there is no proof in the record that Petitioner's sick leave plan is in fact worth more to men than women, it is impossible to find any gender-based discriminatory effect in this policy simply because women disabled as a result of pregnancy do not receive benefits.

That a sick leave plan such as Petitioner's does not, under the opinion of this Court in *Gilbert*, constitute unlawful sex discrimination was apparently recognized when this Court vacated the judgment of the Ninth Circuit Court of Appeals in *Lake Oswego School District No. 7, et al.* v. *Hutchison*, 519 F.2d 961 (1975) and remanded the case for proceedings in accordance with *Gilbert* 45 U.S.L.W. 3462 (No. 75-568, January 10, 1977).

III. Petitioner's Policy of Not Crediting Employees on Leave of Absence, Including Pregnancy Leave, With Accumulated Seniority for Job-Bidding Purposes Does Not Constitute Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964.

Not only did the District Court and the Court of Appeals find that Petitioner violated Title VII by denying sick leave payments to Respondent but both courts also found that Petitioner violated Title VII by not giving Respondent credit for her previously accumulated seniority when she bid on job openings that were available when she was able to return to work. Petitioner submits that such policy does not constitute discrimination on the basis of sex any more than does the denial of pregnancy benefits under the disability insurance plar.

The holdings of this Court in both *Gilbert* and *Geduldig* indicate that the fact that pregnancy is treated differently from other conditions or situations by an employer does not in itself constitute gender-based discrimination. To apply the language of *Geduldig* by analogy, and viewing the risk as the loss of accumulated seniority, "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496-497.

Inasmuch as *Gilbert* clearly stands for the proposition that disparate treatment of pregnancy by an employer is not in itself sex discrimination, it then only remains to determine whether such treatment is a mere pretext designed to effect an invidious discrimination against the members of one sex or whether the effect of such treatment is to discriminate against members of one sex.

It is significant to note in the present case that pregnancy is not the only condition or situation which under the policy of the Petitioner results in a loss of accumulated seniority for job-bidding purposes. Employees on leave of absence for educational reasons do not retain accumulated seniority for job-bidding purposes (App. 30-31). Similarly, an employee who is absent from work due to injury or illness may be placed on formal leave of absence by Petitioner in which case the employee does not retain seniority for job-bidding purposes when he returns to work (App. 18). Thus, unlike the *Gilbert* case, in which apparently only females (i.e., those who were pregnant) were denied benefits under the disability plan, what evidence there is in the record in the present cases indicates that both males and females are, under certain circumstances, denied credit for accumulated seniority for job-bidding purposes.

There is certainly no showing in this case that Petitioner's policy with respect to accumulated seniority is a pretext for discrimination against females. In fact, the record in this case indicates that the Petitioner permits an employee returning from pregnancy leave, as it would permit any other employee returning from a formal leave of absence, to retain seniority for purposes of vacation and pension (App. 30). It is also the policy of the Petitioner to give an employee on pregnancy leave temporary work for which she is qualified when such temporary work is available (App. 30) and in fact Respondent was given such temporary work in this case (App. 31). Furthermore, while an employee returning from pregnancy leave does not retain accumulated seniority for job-bidding purposes, Petitioner's policy would, in awarding jobs favor such employee over an applicant who had not been previously employed by Petitioner (App. 30).

Moreover, the fact that Petitioner's policy with respect to accumulated seniority treats pregnancy differently from heart attacks or back trouble (to use examples cited in the Interrogatories included in the record) does not carry with it any suggestion of an intent to discriminate against females because this Court itself acknowledged in *Gilbert* that pregnancy is significantly different from the typical disease or disability and, as recognized by the District Court in the *Gilbert* case, it is not a "disease" at all and is often a voluntarily undertaken and desired condition. Or as stated by this Court in *Geduldig*, "pregnancy is an objectively identifiable physical condition with unique characteristics." Thus an employer's disparate treatment of pregnancy does not carry with it any indication that it is a pretext for invidious discrimination and there is no evidence in the record that Petitioner had the intent or purpose of discriminating against women.

There is no requirement that the Petitioner recognize seniority for any purpose. Its policy merely favors those employees who are actively working for the company at the time a job opening becomes available to the detriment of those employees on leave of absence, including maternity leave. The benefits of this policy accrue to all continuously employed persons, male and female alike. In fact, in its application to Respondent, the policy had the effect of granting jobs on which she was bidding to other females (App. 33).

Petitioner's policy with respect to accumulated seniority is analogous to the disability plan that was approved by this Court in *Gilbert*. In *Gilbert*, it was recognized that an employer could without violating Title VII fail to provide any disability benefits. Similarly, Petitioner could without violating Title VII provide that any absence from work would result in loss of accumulated seniority for the purpose of bidding on subsequent job openings. In *Gilbert*, the employer determined to pay disability benefits for all non-occupational sickness and accidents except pregnancy and such plan was approved by this Court. In this case, Petitioner has determined to permit the retention of accumulated seniority in cases of sick leave but has determined not to extend such policy to certain other forms of leave such as pregnancy leave, education leave or formal leave of absence after sick leave has been exhausted. If an employer has no obligation to permit absences from work without loss of seniority, it follows that in permitting certain absences without loss of seniority, it is not required to permit all absences to be without loss of seniority. To paraphrase the statement of this Court in *Gilbert*: For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to provide them with retained seniority

in the case of this risk does not destroy the presumed parity of the benefits accruing to men and women alike, which results from the facially evenhanded *inclusion* of absences permitted without loss of seniority.

Furthermore, as in *Gilbert*, the Respondent has introduced no evidence that Petitioner's policy with respect to accumulated seniority has the effect of providing more benefits for males than for females. To do so presumably Respondent would have to show that relative to their proportion of the work force, males are permitted more days of absence from work without loss of accumulated seniority than are females. The record contains no such evidence whatsoever.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the case dismissed.

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